Supreme Court, U.S.
FILED

No. _____ 05 159 AUG 1 - 2005

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In The

Supreme Court of the United States

KATHLEEN INEZ NOVAK,

Petitioner,

vs.

ESTATE OF FRANKIE NOVAK, Incapacitated Person,
by and through SHARON VEST,
Guardian and Conservator,

Respondent.

On Petition For A Writ Of Certiorari
To The Alabama Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. PETITIONER (THE WIFE) WAS DENIED DUE PROCESS OF LAW BY NOT BEING AFFORDED THE OPPORTUNITY FOR AN EVIDENTIARY HEARING AND A PSYCHOLOGICAL EVALUATION OF THE WARD (THE HUSBAND) BEFORE THE MOBILE COUNTY PROBATE COURT AUTHORIZED THE FILING OF A DIVORCE PETITION ON BEHALF OF THE WARD. THE INSTITUTION OF MARRIAGE IS CLEARLY MARKED WITH THE PUBLIC INTEREST AND CANNOT BE DISSOLVED EXCEPT BY DUE JUDICIAL PROCEEDINGS.

II. THE MOBILE COUNTY, ALABAMA PROBATE COURT DID NOT HAVE AUTHORITY UNDER THE ALABAMA UNIFORM GUARDIANSHIP ACT, CODE OF ALABAMA 1975, SECTION 26-2A-108 TO ALLOW THE GUARDIAN TO PETITION FOR DIVORCE ON BEHALF OF THE WARD. THEREFORE, PETITIONER WAS DENIED DUE PROCESS OF LAW BECAUSE A PLAIN READING OF THE STATUTE DOES NOT EVEN ADDRESS THE POSSIBILITY OF THE GUARDIAN'S POWER TO PETITION FOR DIVORCE ON BEHALF OF THE WARD.

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On September 5, 2003, Sharon Vest, acting as conservator/guardian for Frankie Novak, filed a petition for annulment of marriage in Mobile County Circuit Court. Thereafter, in March 2004, Sharon Vest, conservator/guardian, amended the petition for annulment and requested the Mobile County Circuit Court enter a divorce decree, divorcing Petitioner and Frankie Novak. *See Mobile County Circuit Court (Domestic) Case Action Summary Sheet appended hereto as Appendix "D."*

On May 28, 2004, Petitioner filed an emergency petition in the Mobile County Probate Court to enter an order requiring Sharon Vest, guardian/conservator, to withdraw and cease from attempting to obtain a divorce decree. Petitioner also filed an emergency petition to clarify visitation, limit the actions of the guardian/conservator, and make Frankie Novak, the alleged incapacitated person, available for evaluation. *See Mobile County Probate Court Case Action Summary Sheet appended hereto as Appendix "E."*

On June 9, 2004, with no evidentiary hearing or opportunity to evaluate Frankie Novak, the Mobile County Probate Court Ordered that "the conservator is authorized to proceed with the divorce proceedings for said ward in the Domestic Court of Mobile County, Alabama." *See Mobile County Probate Order appended hereto as Appendix "B."* Petitioner then filed a written notice of appeal on or about July 1, 2004.

The Alabama Supreme Court affirmed the Order issued by the Mobile County Probate Court with no opinion. *See Alabama Supreme Court holding appended hereto as Appendix "A."* Petitioner subsequently sought an

application for rehearing in the Alabama Supreme Court. The application for rehearing was overruled on June 10, 2005. *See Alabama Supreme Court Order appended hereto as Appendix "C."*

STATEMENT OF JURISDICTION

The Mobile County Probate Court had jurisdiction over this case pursuant to Code of Alabama 1975, Section 12-13-1. An appeal was taken pursuant to Code of Alabama 1975, Section 12-22-20 to the Alabama Supreme Court of the Mobile County Probate Court's order. The final order from the Alabama Supreme Court was issued on June 10, 2005. This Court's jurisdiction is invoked by timely filing of Petitioner's Writ of Certiorari to the United States Supreme Court pursuant to 28 U.S.C.A. § 1257.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

FIFTH AMENDMENT

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

FOURTEENTH AMENDMENT

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws.

CODE OF ALABAMA 1975, SECTION 26-2A-108

Except as limited pursuant to Section 26-2A-105(c), a guardian of an incapacitated person is responsible for health, support, education, or maintenance of the ward, but is not liable to third persons by reason of that responsibility for acts of the ward. In particular and without qualifying the foregoing, a guardian has the same duties, powers and responsibilities as a guardian for a minor as described in Section 26-2A-78(b), (c) and (d).

CODE OF ALABAMA 1975, SECTION 26-2A-78(b-d)

(b) In particular and without qualifying the foregoing, a guardian shall:

(1) Become or remain personally acquainted with the ward and maintain sufficient contact with the ward to know of the ward's capacities, limitations, needs, opportunities, and physical and mental health;

(2) Take reasonable care of the ward's personal effects and commence protective proceedings if necessary to protect other property of the ward;

(3) Apply any available money of the ward to the ward's current needs for health, support, education, or maintenance;

(4) Conserve any excess money of the ward for the ward's future needs, but if a conservator has been appointed for the estate of the ward, the guardian, at least quarterly, shall pay to the conservator money of the ward to be conserved for the ward's future needs; and

(5) Report the condition of the ward and of the ward's estate that has been subject to the guardian's possession or control, as ordered by the court on petition of any person interested in the ward's welfare or as required by court rule.

(c) A guardian may:

(1) Receive money payable for the support of the ward to the ward's parent, guardian, or custodian under the terms of any statutory benefit or insurance system or any private contract, devise, trust, conservatorship, or custodianship, and money or property of the ward paid or delivered pursuant to Section 26-2A-6;

(2) If consistent with the terms of any order by a court of competent jurisdiction relating to detention or commitment of the ward, take custody of the person of the ward and establish the ward's place of abode within or without this state;

(3) If no conservator for the estate of the ward has been appointed, institute proceedings,

including administrative proceedings, or take other appropriate action to compel the performance by any person of a duty to support the ward or to pay sums for the welfare of the ward;

(4) Consent to medical or other professional care, treatment, or advice for the ward without liability by reason of the consent for injury to the ward resulting from the negligence or acts of third persons unless a parent would have been liable in the circumstances;

(5) Consent to the marriage or adoption of the ward; and

(6) If reasonable under all of the circumstances, delegate to the ward certain responsibilities for decisions affecting the ward's well-being.

(d) A guardian is entitled to reasonable compensation for services as guardian and to reimbursement for room, board and clothing personally provided to the ward, but only as approved by order of the court. If a conservator, other than the guardian or one who is affiliated with the guardian, has been appointed for the estate of the ward, reasonable compensation and reimbursement to the guardian may be approved and paid by the conservator without order of the court controlling the guardian.

CODE OF ALABAMA 1975,
SECTION 26-2A-136

(a) The court shall exercise the authority conferred in this division to encourage the development of maximum self-reliance and independence of a protected person and make protective orders only to the extent necessitated by the protected person's mental and adaptive limitations and other conditions warranting the procedure.

(b) The court has the following powers that may be exercised directly or through a conservator in respect to the estate and business affairs of a protected person:

(1) While a petition for appointment of a conservator or other protective order is pending and after preliminary hearing and without notice, the court may preserve and apply the property of the person to be protected as may be required for the support of the person or dependents of the person.

(2) After hearing and upon determining that a basis for an appointment or other protective order exists with respect to a minor without other disability, the court has all those powers over the estate and business affairs of the minor which are or may be necessary for the best interest of the minor and members of minor's immediate family.

(3) After hearing and upon determining that a basis for an appointment or other protective order exists with respect to a person for reasons other than minority, the court, for the benefit of the person and members of the person's immediate family, has all the powers over the estate and business affairs which the person could exercise if present and not under disability, except the power to make a will. Subject to subsection (c), those powers include, but are not limited to, power to make gifts; to convey or release contingent and expectant interests in property, including marital property rights and any right of survivorship incident to joint tenancy or tenancy by the entirety; to exercise or release powers held by the protected person as trustee, personal representative, custodian for minors, conservator, or donee of a power of appointment; to enter into

contracts; to create revocable or irrevocable trusts of property of the estate which may extend beyond the disability or life of the protected person; to exercise options of the protected person to purchase securities or other property; to exercise rights to elect options and change beneficiaries under insurance and annuity policies and to surrender the policies for their cash value; to exercise any right to an elective share in the state of the person's deceased spouse and to renounce or disclaim any interest by testate or intestate succession or by inter vivos transfer.

(c) The court may exercise or direct the exercise of the following powers only if satisfied, after notice and hearing, that it is in the best interest of the protected person, and that the person either is incapable of consenting or has consented to the proposed exercise of power:

(1) To exercise or release powers of appointments of which the protected person is done;

(2) To renounce or disclaim interests;

(3) To make gifts in trust or otherwise exceeding in the aggregate 20 percent of the year's income of the estate; and

(4) To change beneficiaries under insurance and annuity policies.

(d) Except for the disability necessitating the appointment, a determination that a basis for appointment of a conservator or other protective order exists has no effect otherwise on the capacity of the protected person. A conservator has all the powers granted by this section, unless specifically limited by the court. A protected person does not have or possess powers granted to the conservator.

CODE OF ALABAMA 1975, SECTION 30-2-40(a)(2)

(a) The court shall enter a decree of legal separation if all of the following requirements are satisfied:

(2) The court determines the marriage is irretrievably broken or there exists a complete incompatibility of temperament or one or both of the parties desires to live separate and apart.

STATEMENT OF THE CASE

A. Procedural History

On January 23, 2003, the Mobile County Probate Court granted an Order appointing Sharon Vest (the daughter) temporary guardianship and temporary Letters of Guardianship over Frankie Novak, her alleged incompetent father. [C-27, 28]. Thereafter, Sharon Vest filed an amended petition for guardianship and conservatorship as to the alleged incompetent father, Frankie Novak. On February 23, 2003, Petitioner (the wife) filed an emergency petition for appointment of conservator and guardian. Petitioner also filed a motion to review the temporary guardianship granted on January 23, 2003. [C-40-45].

On June 27, 2003, the Mobile County Probate Court denied Petitioner's petition for conservatorship and guardianship over Frankie Novak. The Mobile County Probate Court appointed Sharon Vest as conservator over the assets of Frankie Novak, an incapacitated person, pursuant to Code of Alabama 1975, Section 26-2A-102, and Ordered that Letters of Guardianship forthwith issue. The Letters of Guardianship and Letters of Conservatorship were issued on June 27, 2003. [C-109-111].

On September 5, 2003, Sharon Vest (the daughter) filed a petition for annulment of the marriage of her parents in Mobile County Circuit Court. Thereafter, in March 2004, Sharon Vest, conservator/guardian, amended the petition for annulment and requested the Mobile County Circuit Court enter a divorce decree, divorcing Petitioner (the wife) and Frankie Novak (the ward).

On May 28, 2004, Petitioner filed an emergency petition in the Mobile County Probate Court to enter an order requiring Sharon Vest, guardian/conservator, to withdraw and cease from attempting to obtain a divorce decree. Petitioner also filed an emergency petition to clarify visitation, limit the actions of the guardian/conservator, and make Frankie Novak, the alleged incapacitated person, available for evaluation. [C-124-126].

With no evidentiary hearing or evaluation of Frankie Novak, the Mobile County Probate Court Ordered that "the conservator is authorized to proceed with the divorce proceedings for said ward in the Domestic Court of Mobile County, Alabama." [C-131]. Petitioner subsequently appealed this adverse ruling to the Alabama Supreme Court. The Alabama Supreme Court affirmed the Mobile County Probate Court's order with no opinion. Petitioner then filed an application for rehearing in the Alabama Supreme Court. The application for rehearing was overruled without opinion. Petitioner now seeks a writ of certiorari to the United States Supreme Court.

B. Statement of the Facts

Petitioner and Frankie Novak were married for many years and parented two children, David Novak and Sharon Vest. David Novak and Sharon Vest are currently in their

forties. [C-42]. After their children reached the age of majority, Petitioner and Frankie Novak were granted a divorce yet continued to live together until their second ceremonial marriage on January 4, 2001. [C-54, 96].

In 2000, Sharon Vest, Frankie Novak's daughter, filed the original petition to establish conservatorship and guardianship over her father, Frankie Novak. A motion to dismiss Sharon Vest's original petition to establish conservatorship and guardianship was filed and subsequently granted in May, 2001. [C-1, 2, 16-18].

On January 22, 2003, Sharon Vest filed an emergency petition for Letters of Conservatorship and Guardianship for Frankie Novak, her alleged incapacitated father. [C-23-25]. On January 23, 2003, the Mobile County Probate Court granted an Order appointing temporary guardianship and temporary Letters of Guardianship. [C-27,28]. Thereafter, Sharon Vest filed an amended petition for guardianship and conservatorship as to the alleged incompetent father, Frankie Novak. On February 23, 2003, Petitioner filed an emergency petition for appointment of conservator and guardian. Petitioner also filed a motion to review the temporary guardianship granted on January 23, 2003. [C-40-45].

On February 28, 2003, the Mobile County Probate Court granted a motion to continue the appointment of a temporary guardian. Subsequently, Petitioner filed amendments to her petition to be appointed guardian and conservator of Frankie Novak, her husband and alleged incapacitated person. [C-47-58].

On June 27, 2003, the Mobile County Probate Court denied Petitioner's petition for conservatorship and

guardianship over Frankie Novak. However, the Mobile County Probate Court found Frankie Novak to be incapacitated and unable to manage his financial affairs. The Order's language clearly indicated that Frankie Novak was unable to manage his financial affairs: "Frankie Novak is hereby found to be incapacitated and **unable to manage his financial affairs.**" (Emphasis added). The Mobile County Probate Court appointed Sharon Vest as conservator over the assets of Frankie Novak, an incapacitated person, pursuant to Code of Alabama 1975, Section 26-2A-78, and Ordered that Letters of Guardianship forthwith issue. The Letters of Guardianship and Letters of Conservatorship were issued on June 27, 2003. [C-109-111].

Sharon Vest, pursuant to the appropriate Guardian and Conservatorship Letters undertook administration of Frankie Novak's estate. On September 5, 2003, Sharon Vest filed a petition for annulment of the marriage of her parents, in Mobile County Circuit Court. The petition for annulment sought to annul the marriage between Petitioner and Frankie Novak. In March 2004, Sharon Vest, conservator/guardian, amended the petition for annulment and requested the Mobile County Circuit Court enter a divorce decree, divorcing Petitioner and Frankie Novak.

At the time Sharon Vest filed a petition for annulment of marriage and divorce, Frankie Novak was residing at the Snook Alzheimer's Facility in Baldwin County, Alabama. This is an assisted care facility. In an attempt to see her husband and gain more reasonable visitation, Petitioner filed an emergency petition in the Mobile County Probate Court on May 28, 2004. Petitioner requested the Court enter an order requiring Sharon Vest, guardian/conservator, to withdraw and cease from attempting to obtain a divorce decree on the basis that neither the

Probate Court, nor the guardian/conservator had authority to authorize such a divorce proceeding on behalf of Frankie Novak, the alleged incapacitated person. Petitioner also requested the Court issue an order that would clarify visitation, limit the actions of the guardian/conservator, and make Frankie Novak, the alleged incapacitated person, available for evaluation. [C-124-126]. Petitioner requested the evaluation to determine if it would be feasible for Frankie Novak and Petitioner to live jointly together in an assisted living facility.

With no evidentiary hearing or evaluation of Frankie Novak, the Mobile County Probate Court summarily Ordered that "the conservator is authorized to proceed with the divorce proceedings for said ward in the Domestic Court of Mobile County, Alabama." [C-131]. Petitioner subsequently appealed this adverse ruling to the Alabama Supreme Court. The Alabama Supreme Court affirmed the Mobile County Probate Court's order with no opinion. Petitioner then filed an application for rehearing in the Alabama Supreme Court. The application for rehearing was overruled without opinion. Petitioner now seeks a writ of certiorari in the United States Supreme Court.

REASONS FOR GRANTING THE WRIT

I. PETITIONER (THE WIFE) WAS DENIED DUE PROCESS OF LAW BY NOT BEING AFFORDED THE OPPORTUNITY FOR AN EVIDENTIARY HEARING AND A PSYCHOLOGICAL EVALUATION OF THE WARD (THE HUSBAND) BEFORE THE MOBILE COUNTY PROBATE COURT AUTHORIZED THE FILING OF A DIVORCE PETITION ON BEHALF OF THE WARD. THE INSTITUTION OF MARRIAGE IS CLEARLY MARKED WITH THE PUBLIC INTEREST AND CANNOT BE DISSOLVED EXCEPT BY DUE JUDICIAL PROCEEDINGS.

This is a case where the Petitioner is being divorced against her will. The guardian has been allowed to proceed with divorce proceedings on behalf of the ward (Petitioner's spouse) without any evidence that suggests the ward was seeking a divorce, desiring a divorce, nor whether a divorce is even in his best interests. Petitioner wants to remain married to the ward. Public policy and due process require that Petitioner at least have the opportunity to hear why a divorce proceeding is being taken against her. This Court has held that marriage is a sacred institution and cannot be dissolved except by due process proceedings. Due process requires that Petitioner is entitled to know why the divorce proceedings are being taken against her. Accordingly, this writ should issue.

Petitioner was denied due process of law under the Fifth and Fourteenth Amendments of the U.S. Constitution because marriage is purely a personal choice and there is nothing in the record here that indicates either party is seeking a divorce. This Court has long recognized that freedom of personal choice in matters of marriage and

family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment. *Smith v. Organization of Foster Families*, 431 U.S. 816, 842-844, 97 S.Ct. 2094, 2109-2110, 53 L.Ed.2d 14 (1977); *Moore v. City of East Cleveland*, 431 U.S. 494, 499, 97 S.Ct. 1932, 1935-1936, 52 L.Ed.2d 531 (1977); *Paul v. Davis*, 424 U.S. 693, 713, 96 S.Ct. 1155, 1166, 47 L.Ed.2d 405 (1976). And the decisions of this Court have made clear that freedom of personal choice in matters of marriage and family life is one of the liberties so protected. *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 639, 94 S.Ct. 791, 39 L.Ed.2d 52 (1974); *Roe v. Wade*, 410 U.S. 113, 152-153, 93 S.Ct. 705, 726-727, 35 L.Ed.2d 147 (1973); *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967); *Griswold v. Connecticut*, 381 U.S. 479, 485-486, 85 S.Ct. 1678, 1682-1683, 14 L.Ed.2d 510 (1965); *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070, 39 A.L.R. 468 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042, 29 A.L.R. 1446 (1923). *See also Prince v. Massachusetts*, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541, 62 S.Ct. 1110, 1113, 86 L.Ed. 1655 (1942).

The Mobile County Probate Court, by denying Petitioner a hearing, unjustifiably interfered with the Petitioner's marriage because the Mobile County Probate Court allowed the divorce proceedings to continue without making any findings of fact or conclusions of law that related to the ward's wishes or concerns regarding his marriage, or even if it was in his best interests to get a divorce.

> " . . . [I]t is clear that among the decisions that an individual may make without unjustified government interference are personal decisions relating to marriage. . . ." *Carey v. Population Services*

International, 431 U.S. 678, 684-685, 97 S.Ct. 2010, 2016, 52 L.Ed.2d 675 (1977).

Therefore, the Mobile County Probate Court unjustifiably interfered with the ward's personal decisions regarding his marriage wishes because there was no evidence that he or the Petitioner sought a divorce.

The record is incomplete because the Mobile County Probate Court denied Petitioner an evidentiary hearing to determine both spouses' personal wishes regarding the divorce petition filed by the guardian. The record will be complete once the ward and Petitioner have had an opportunity to express their personal decisions relating to their marriage, or at least have a professional evaluate the ward for purposes of determining whether a divorce is in his best interests. The due process clause of the Fourteenth Amendment requires that Petitioner is due this minimum procedural safeguard before the divorce proceeding can continue. Therefore, this Court should grant the writ to the Alabama Supreme Court and require the Mobile County Probate Court to provide Petitioner an evidentiary hearing.

The Mobile County Probate Court denied Petitioner due process of law by denying Petitioner an evidentiary hearing regarding the ward's wishes because a marriage cannot be dissolved except by "due judicial proceedings." *Boddie v. Connecticut*, 401 U.S. 371, 381 n.8, 91 S.Ct. 780, 28 L.Ed.2d 113 (1974) quoting *Jeffreys v. Jeffreys*, 58 Misc.2d 1045, 1056, 296 N.Y.S.2d 74, 87 (1968). Here, Petitioner's due process rights were violated because she was denied a hearing to determine the wishes of the ward with regard to the divorce proceeding against her. Due process requires that the ward must manifest some degree

of competency to allow a petition for divorce so that the policy goals of marriage are not threatened.

Although the Alabama Supreme Court has allowed a conservator/guardian to file a petition of divorce for an incompetent ward in the absence of statutory authority,[1] Alabama appellate courts have not specifically addressed the question of whether the guardian/conservator needs to exhibit some degree of competency in order to petition for divorce on behalf of the ward. *See Campbell v. Campbell*, 241 Ala. 141, 5 So.2d 401 (Ala. 1941); *Hopson v. Hopson*, 257 Ala. 140, 57 So.2d 505 (Ala. 1952). However, at least three states (California, Ohio and Pennsylvania) which permit a guardian to initiate a suit for divorce in the absence of specific statutory authority require that the ward exhibit some degree of competency to express that they seek a divorce against their spouse.

The California Supreme Court has held that a divorce petition brought by a guardian provided that the guardian must establish that the ward is capable of exercising a judgment and expressing a wish that the marriage be dissolved on the account of irreconcilable differences. *In re the Marriage of Higgason*, 110 Cal.Rptr. 897, 516 P.2d 289 (Calif. 1973).

In *Boyd v. Edwards*, 4 Ohio App.3d 142, 446 N.E. 1151 (Ohio App. 1982), the Ohio Court of Appeals found that when presented with a petition for divorce on behalf of a party adjudged incompetent because of certain physical and mental limitations, a court has a duty to ascertain

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[1] The Alabama Uniform Guardianship Act, Code of Alabama, 1975, Section 26-2A-108, does not grant authority to a conservator/guardian to file a petition for divorce of an incompetent ward.

from the ward himself, if possible, whether it is his sincere wish and desire to divorce his spouse before proceeding further.

In *Syno v. Syno*, 406 Pa.Super. 218, 594 A.2d 307 (1991), a guardian was permitted to institute a divorce proceeding on behalf of the ward provided the ward was capable or exercising reasonable judgment as to personal decisions, understands the nature of the action and is able to express unequivocally a desire to dissolve the marriage.

Even in the states that appear to allow the guardian to petition for divorce on behalf of the ward outright caution against permitting a guardian to use the dissolution process to further his/her own interests. For example, the Washington Supreme Court cautioned that the authority of the guardian to pursue a divorce on behalf of a ward must not be used primarily to further the inheritance interests of the ward's potential heirs. *See In re the Marriage of Gannon*, 702 P.2d 465, 104 Wash.2d 121 (Wash. 1985). The same concerns were expressed in *Nelson v. Nelson*, 118 N.M. 17, 878 P.2d 355 (N.M.App.1994). There, the Court said that the wishes of an incompetent spouse must be ascertained when the motive of the guardian pursuing a divorce on his behalf are questioned. *Id.*

Although Alabama appellate courts have not addressed the issue of whether a hearing is necessary to obtain evidence to determine the ward's best interests, the Washington Supreme Court has unequivocally held that a hearing is due. Washington, like Alabama, has no specific statutory authority that allows the guardian to petition for divorce on behalf of the ward. *In re the Marriage of Gannon*, 702 P.2d at 466. In *In re the Marriage of Gannon*,

702 P.2d 465, 104 Wash.2d 121 (Wash. 1985), the Washington Supreme Court held that,

> "[I]n cases in which the guardian believes a dissolution to be in the best interests of the incompetent ward, such authority must be sought specifically by a special petition for that purpose. **The court must then hold a hearing to obtain evidence of what action is in the best interests of the ward.** The discretion of the trial court will test these matters, **again with great emphasis upon the interests of the ward and the necessities and the interests of the competent spouse.**" (Emphasis added).

Because the Washington Supreme Court has deemed a hearing necessary to determine the interests of the ward, there is no reason why Alabama citizens should not be afforded the same procedural safeguards. Due process requires that the ward must manifest some degree of competency when a guardian petitions for divorce on his behalf. The public policy relating to marriage is to foster and protect it, to make it a permanent and public institution, to encourage the parties to live together, and to prevent separation. Because marriage is clearly marked with the public interest, a marriage cannot be dissolved except by "due judicial proceedings.... " *Boddie*, 401 U.S at 381. Denying the Petitioner the opportunity to conduct a hearing to determine if the ward's interests are in keeping with the guardian's actions do not further the policy goals of marriage, rather they inhibit those goals. Accordingly, Petitioner is due a hearing to determine the ward's wishes.

In Alabama, the law is clear that a Court may not enter a decree of legal separation unless "the marriage is irretrievably broken or there exists a complete incompatibility or one or

both parties desires to live separate and apart." Code of Alabama 1975, Section 30-2-40(a)(2). Here, the record is completely devoid of any evidence suggesting the Petitioner's marriage with the ward was irretrievably broken, that Petitioner was incompatible with the ward or that either party was seeking a divorce. Marriage is a sacred institution. The Alabama legislature has provided for dissolution only on the condition that at least one party to the marriage contract must allege the marriage is irretrievably broken. The Mobile County Probate Court, by not allowing a hearing to allow Petitioner to determine the ward's wishes pertaining to divorce, has amended the Alabama divorce statute by judicial fiat. This they cannot constitutionally do and this Court should grant this writ to the Alabama Supreme Court requiring the Mobile County Probate Court to conduct an evidentiary hearing to protect Petitioner's constitutional due process procedural safeguards.

The necessity for a hearing is more apparent when the record is devoid the ward's wishes concerning marriage. Marriage is a civil contract, a personal and human relationship, as well as an institution. It cannot be created except by the consent of the parties. Likewise, it cannot be dissolved except by the consent and intelligent exercise of the will of one of the parties. *See Boyd v. Edwards*, 4 Ohio App.3d 142, 147, 446 N.E.2d 1151 (1982) quoting *Shenk v. Shenk*, 100 Ohio App. 32, 33-34, 135 N.E.2d 436 (1954). *See also* Annot., *Power of Incompetent Spouse's Guardian, Committee, or Next Friend for Granting or Vacation of Divorce or Annulment, or to Make a Compromise or Settlement in Such Suit*, 6 A.L.R.3d 681 (1966). Here, the record is devoid of any indication either the Petitioner or the ward was seeking a divorce. There is nothing in the

record indicating that Petitioner had a material or adverse effect on the ward. There has been no suggestion that Petitioner has been anything other than kind to the ward and attentive to his needs. The guardian has presented no evidence as to the current wishes of the ward. In fact, there is nothing in the record that suggests he has ever been informed about the action taken on his behalf, much less whether he had the capacity and desire to render such a decision. Inevitably, a hearing would allow the interested parties the opportunity to be heard and allow the Petitioner the opportunity to give the trial court the necessary information to determine the ward's and competent spouse's best interests. Accordingly, this Court should grant this writ to the Alabama Supreme Court and require the Mobile County Probate Court to conduct a hearing to determine the ward's wishes and the Petitioner's interests.

If this Court allows the guardian to petition for divorce on behalf of the ward without any evidence in the record that indicates the ward's wishes, it will allow her and others similarly situated to unreasonably further their inheritance interests and deny Petitioner property interests without due process of law. Thus, this Court should apply the Court's reasoning in *Nelson v. Nelson*, 118 N.M. 17, 878 P.2d 355 (N.M. App. 1994) which makes it necessary to determine the ward's wishes when the motive of the guardian is questioned. Providing for a hearing to determine the ward's wishes when the motive of the guardian is questioned will seek to prevent fraud, coercion and other types of malfeasance. There must be some allegation that a dissolution is in the best interests of the ward, not just the guardian or their heirs. *See In re Jennings*, 187 N.J. Super. 55, 453 A.2d 572 (1981). Here, Petitioner has questioned the guardian's motive with

regard to inheritance because a divorce between Petitioner and the ward will lead to a windfall in inheritance for the guardian. To protect the ward's and Petitioner's interests, a hearing should be granted to determine whether the guardian's motives are self-serving or in the interest of the ward. Not allowing a hearing to question the ward's motives will deny Petitioner property interests without due process of law and violate Petitioner's Fifth Amendment rights under the U.S. Constitution.

It is also important to note that not every unsoundness of the mind will void a marriage contract. *Johnson v. Johnson*, 104 N.W.2d 8 (N.D. 1960). Because there is nothing in the record to reflect that the ward could not express his wishes, the Petitioner was entitled to a hearing to raise a rebuttable presumption of the ward's incapacity to determine whether his interests and wishes were to divorce Petitioner. This is analogous to a testator who has been adjudicated incompetent but has intervals of lucidity which makes the testator capable of making a valid will. Thus, it follows that the Mobile County Probate Court, when presented with the guardian's petition for divorce, had a duty to ascertain from the ward himself, if possible, whether it is his sincere wish and desire to divorce Petitioner, especially where there is no evidence in the record to indicate that the ward could not express and communicate his feelings about the matter. *See Boyd v. Edwards*, 446 N.E. 1151, 1159 (Ohio App. 1982).

II. THE MOBILE COUNTY, ALABAMA PROBATE COURT DID NOT HAVE AUTHORITY UNDER THE ALABAMA UNIFORM GUARDIANSHIP ACT, CODE OF ALABAMA 1975, SECTION 26-2A-108 TO ALLOW THE GUARDIAN TO PETITION FOR DIVORCE ON BEHALF OF THE WARD. THEREFORE, PETITIONER WAS DENIED DUE PROCESS OF LAW BECAUSE A PLAIN READING OF THE STATUTE DOES NOT EVEN ADDRESS TEH POSSIBILITY OF THE GUARDIAN'S POWER TO PETITION FOR DIVORCE ON BEHALF OF THE WARD.

Petitioner was denied due process of law because she and other similarly situated Alabama citizens do not have notice that a guardian/conservator can petition for divorce on behalf of the ward. Code of Alabama 1975, Section 26-2A-108, entitled "General Powers and Duties of Guardians" addresses the powers and responsibilities of guardians duly appointed, and there is absolutely no authority granted to a guardian to petition for divorce on behalf of the ward.

The proper analysis in determining whether the Alabama legislature intended for a guardian to have the power to petition for divorce on behalf of the ward must first turn to the plain reading of the statute. The Mobile County Probate Court's order that allowed the guardian to continue with the divorce proceedings did so without any statutory authority. Hence, it was the Mobile County Probate Court's mere speculation that the guardian's power enumerated under the Code of Alabama allowed the guardian to petition for divorce on behalf of the ward. This Court has held that, "[s]peculation loses, for the more natural reading of the statute's text. . . . " *United Food and*

Commercial Workers Union Local 751 v. Brown Group, Inc., 517 U.S. 544, 116 S.Ct. 1529 (1996).

If the Alabama legislature had intended that a guardian had the authority to petition for divorce on behalf of the ward, it would have enumerated such a power in the language of the statute. A plain reading of the statute indicates that the guardian does not have authority to petition for divorce on behalf of the ward, and the Mobile County Probate Court's order was based on mere speculation that the controlling statute provided for the same. Accordingly, Petitioner and other Alabama citizens have no reasonable means of notice a guardian may petition for divorce on behalf of the ward.

The Petitioner was denied due process of law because the statute that enumerates the guardian's power with respect to the ward does not put her or other Alabama citizens on sufficient notice that the guardian has the authority to petition for divorce. This Court's position on notice is clear:

> "Engrained in our concept of due process is the requirement of notice. Notice is sometimes essential so that the citizen has the chance to defend charges. Notice is required before property interests are disturbed, before assessments are made, before penalties are assessed. Notice is required in a myriad of situations where a penalty or forfeiture might be suffered for mere failure to act." *Lambert v. People of State of California*, 355 U.S. 225, 228, 78 S.Ct. 240, 243 (1957).

Here, there is no language in the controlling statute that authorizes a guardian to petition for divorce on behalf of the ward. Therefore, Petitioner and Alabama citizens have not been put on sufficient notice that the guardian's

powers with respect to the ward include the power to petition for the ward's divorce.

The Mobile County Probate Court's order appointing the ward as conservator and guardian only spelled out that the powers of the guardian were "such powers and duties as set forth in 26-2A-78, Code of Alabama, 1975." The Probate Court's order only referred to the code section that pertains to minors, thus it is important here to review the general powers and responsibilities set forth in Code of Alabama 1975, Section 26-2A-108 which states: "A guardian of an incapacitated person is responsible for health, support, education, or maintenance of the ward. . . . " Certainly, the filing of a divorce on behalf of an incompetent alleged to have Alzheimer's does not fit within the responsibilities as listed here and enumerated as 1) health; 2) support; 3) education; 4) maintenance of the ward. In this case, filing a divorce on behalf of an eighty (80) plus year old man suffering from the beginnings of Alzheimer's without any evidence indicating that his wishes were to get a divorce clearly does not fit within the guardian's responsibilities.

Code of Alabama 1975, Section 26-2A-136(a) provides in part that "[t]he court shall exercise the authority . . . to encourage the development of maximum self reliance and independence of a protected person and make protective order only to the extent necessitated by the protected person's mental and adaptive limitations. . . . " The record here is completely devoid of any evidence that the Mobile County Probate Court tried, in any way, to ascertain the ward's concerns regarding the status of his marriage with Petitioner. Thus, the Mobile County Probate Court did not "encourage maximum self reliance and independence." Accordingly, the Petitioner's writ should be granted to the

Alabama Supreme Court and require the Mobile County Probate Court to provide Petitioner, at a constitutional minimum, an evidentiary hearing, if not stop the proceeding altogether for lack of authority in the controlling statute.

Code of Alabama 1975, Section 26-2A-136 also enumerates the guardian's powers with respect to the ward. Section 26-2A-136(b)(3) states that a guardian does not have the power to execute a will on behalf of the ward. It follows logically that if a guardian cannot execute a will on behalf of the ward, neither can they petition for the divorce on behalf of the ward. Divorce, as the drafting of a will, is purely a personal decision. Because this Court has held that decisions relating to marriage are purely personal, and there is no specific statutory authority in Alabama that allows the guardian to petition for divorce on behalf of the ward, it follows that matters of divorce should be reconciled by the married parties, not the Courts.

Code of Alabama 1975, Section 26-2A-136(c)(1-4) outlines certain powers a Court may exercise or direct after notice and hearing. These include exercising or releasing powers of appointment done by the ward, renouncing or disclaiming interests, making gifts in trust, and changing beneficiaries under insurance and annuity policies. Note that the Alabama legislature did not allow a Court to confer or exercise the power of divorce to the guardian on behalf of the ward. Certainly, if the Alabama legislature did not include divorce as power that may be delegated to the guardian, then the Alabama legislature did not intend for a guardian to be able to petition for divorce on behalf of the ward.

CONCLUSION

Petitioner was denied due process of law under the Fifth and Fourteenth Amendments of the U.S. Constitution when she was denied a hearing to ascertain the ward's wishes because marriage is purely a personal choice and there is nothing in the record here that indicates either party is seeking a divorce. Because a marriage cannot be dissolved except by due process proceedings and Petitioner was denied an opportunity to be heard, she is entitled to a hearing to determine the ward's wishes. Marriage is a sacred institution and a fundamental right. The Mobile County Probate Court, by judicial fiat, has bypassed Petitioner's procedural due process rights and amended the Alabama Probate statute by allowing a divorce proceeding to occur without any evidence in the record suggesting that at least one party was seeking a divorce.

The Mobile County Probate Court not only denied Petitioner procedural due process rights, but also denied Petitioner due process of law because the order it issued was without any statutory authority. It is important to note that Alabama does not provide specific statutory authority for a guardian to petition for divorce on behalf of the ward, and public policy is strongly against the same. Accordingly, this Court should grant the writ.

Respectfully submitted,

RICHARD G. ALEXANDER
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Mobile, Alabama 36602
Phone: (251) 438-3666
Fax: (251) 438-3667

APPENDIX "A"

STATE OF ALABAMA – JUDICIAL DEPARTMENT
THE SUPREME COURT
OCTOBER TERM, 2004-2005

(Released Apr. 3, 2005)

1031521

Kathleen Inez Novak v. Frankie Novak, an incapacitated person, by and through Sharon Vest, his guardian and conservator (Appeal from Mobile Probate Court: No. 2000-2637).

HARWOOD, Justice.

AFFIRMED. NO OPINION.

See Rule 53(a)(1) and (a)(2)(E), Ala. R. App. P.

Nabers, C.J., and See, Stuart, and Bolin, JJ., concur.

APPENDIX "B"

STATE OF ALABAMA
PROBATE COURT OF MOBILE COUNTY

Case No.	2000-2637
Style:	Frankie Novak, incapacitated person
Matter:	Emergency petition to clarify visitation, limit the actions of the guardian/conservator, and make the alleged incapacitated available for evaluation
Date:	June 9, 2004

ORDER

Said matter is now properly before the Court pursuant to its jurisdiction and authority as conferred by statute and constitutional provisions, and on due consideration of the pleading and evidence, the following **ORDER AND RULING** is hereby issued:

1. Conservator is authorized to proceed with the divorce proceedings for said ward in the Domestic Court of Mobile County, Alabama.

2. The portion of the petition pertaining to visitation and evaluation question are to be taken up at a later date.

ORDERED AND DECREED

/s/ J. Michael Druhan
J. Michael Druhan,
Temporary Judge of Probate

C: Counsel of record

EXHIBIT "A"

IN THE PROBATE COURT
OF MOBILE COUNTY, ALABAMA

IN RE: THE ESTATE OF :

FRANKIE NOVAK : **CASE NO. 2000-2637**

(alleged) incapacitated person :

ORDER

This matter coming before the Court on the motion of Kathleen Inez Novak to declare the Court's authorization for the conservator to proceed with a divorce proceeding for said ward in the Domestic Court of Mobile County, Alabama, to be a final Order of this Court and the Court finding no just reason for delay in making the aforesaid judgment final, it is hereby **ORDERED, ADJUDGED** and **DECREED,** pursuant to Rule 54(b) of the Alabama Rules of Civil Procedure, that the Order of this Court holding:

> "Conservator is authorized to proceed with the divorce proceedings for said ward in the Domestic Court of Mobile County, Alabama".

is a final appealable Order of this Court.

/s/ J. Michael Druhan
J. MICHAEL DRUHAN
Temporary Judge of Probate Court

[SEAL]

APPENDIX "C"

IN THE SUPREME COURT OF ALABAMA

[LOGO]

June 10, 2005

1031521

Kathleen Inez Novak v. Frankie Novak, an incapacitated person, by and through Sharon Vest, his guardian and conservator (Appeal from Mobile Probate Court: No: 2000-2637).

ORDER

The application for rehearing filed in this cause is overruled.

HARWOOD, J. – Nabers, C.J., and See, Stuart, and Bolin, JJ., concur.

APPENDIX "D"

D. SHELTON
Date 2/5/04

AVS0351 DR 2003 502102.00

JUDGE: J. DONALD BANKS

ALABAMA JUDICIAL DATA CENTER
CASE ACTION SUMMARY
CIRCUIT CIVIL

IN THE CIRCUIT COURT OF MOBILE COUNTY

FRANKIE NOVAK vs INEZ NOVAK
FILED: 09/05/2003 TYPE: CONTESTED DIVORCE
TYPE TRIAL: NON-JURY TRACK:

* *

DATE1: 02/05/04 CA: CA DATE:
DATE2: AMT: $0.00 PAYMENT: P
DATE3:

* *

PLAINTIFF 001: NOVAK FRANKIE BY & THROUGH SHARON VEST

ATTORNEY: BLACKSHER WESLEY H
AL 00000-0000 BLA054 126 GOVERNMENT STREET
PHONE: (205) 000-0000 PO BOX 50164
MOBILE, AL 36605
ENTERED: 09/05/2003 ISSUED: TYPE: (251) 432-1010
SERVED: ANSWERED: JUDGEMENT:
DEFENDANT 001: NOVAK INEZ
ATTORNEY: RICHARD G. ALEXANDER(AL
ALE001 438-3666
, AL 00000-0000
PHONE: (205) 000-0000

ENTERED: 07/05/2003 ISSUED: TYPE:
SERVED: ANSWERED: JUDGEMENT:
FILED 09052003 1. COMPLAINT FOR ANNULMENT

9/11/03	2.	Order Setting Cause on Trial disposition Docket 11/07/03 for: CS-47 or Dismiss
10/07/03	3.	CS-47
10/08/03	4.	Pretrial Order of Court 02/05/04
10/08/03	5.	Summons & Return & Cpy & Cpy Complaint & Cpy Order Issd 02/05/04 MC
10/15/03	SVD	
11/21/03	6.	ANSWER (D) ATTY SVD CPY
2/5/04	7.	MOTION TO DISMISS (D) ATTY SVD CPY
2/6/04	8.	ORDER OF COURT/(RESET 4/1/04 9AM)
3/3/04	9.	AMENDED COMPLIANT FOR ANNULMENT (P) ATTY SVD CPY
3-31-04	10.	Order of Continuance Reset: July 1, 2004 @ 9:00 a.m.
7-1-04	11.	Order of Continuance Reset: 12-9-04
7/1/04	12.	MOTION TO STAY DIVORCE PROCEEDING OR CONTINUANCE TRIAL (D) ATTY SVD CPY
12/08/04	13.	Motion for Continuance (P)atty svd cpy
12-10-04	14.	\Order of Court (Admin)
6/22/05	15.	Motion to Reinstate ([illegible])

* [Illegible] * * SET *

NAT 09/08/2003 DR 2003 502102.00

APPENDIX "E"

Probate Court of Mobile County

CASE NO.	DATE	TIME	STYLE
20002637	**7**	**91989**	**FRANKIE NOVAK, INCAPACITATED**
	JUDGE	COURTROOM	CAUSE ID & TYPE
	4	**#2**	**7 – MISCELLANEOUS PROCEEDINGS**

ATTORNEYS & REPRESENTATIONS

Richard G. Alexander	ATT	Frankie Novak	INCAP. PERSON
Wesley H. Blacksher	ATT	Inez Novak	PETITIONER
		Sharon Vest	GUARDIAN/ CONSERVATOR

PROCEEDING: 06/01/2004 CALENDAR: 06/08/2004 13:30

Emergency petition to clarify visitation, limit the actions of the guardian/conservator, and make the alleged incapacitated available for evaluation filed by Inez Novak. Set for June 8th, 2004 at 1:30 p.m. Frank Kruse appointed as GAL.

PROCEEDING: 06/08/2004 CALENDAR:

Hearing held. Objection to emergency hearing filed by conservator.

PROCEEDING: 06/09/2004 CALENDAR:

Order entered. Conservator is authorized to proceed with the divorce proceedings for said ward in the Domestic Court of Mobile County, Alabama. Portion of petition pertaining to visitation and evaluation question are to be taken up at a later date.

PROCEEDING: 07/14/2004 CALENDAR: 08/06/2004 09:00

Petition heretofore filed pertaining to visitation and evaluation of ward is set for August 6th, 2004 at 9:00 a.m. #2. Order forwarded to attys and GAL.
Petition pertaining to visitation and evaluation reset to August 13th, 2004 at 9:00 a.m. #2.

PROCEEDING: 07/14/2004 CALENDAR: 08/13/2004 09:00

Petition heretofore filed pertaining to visitation and evaluation of ward is set for August 6th 2004 at 9:00 a.m. #2. Order forwarded to attys and GAL.
Petition pertaining to visitation and evaluation reset to August 13th, 2004 at 9:00 a.m. #2.

PROCEEDING: 07/27/2004 CALENDAR:

1 Subpoena by MCSO: [15]
Rosa Clements c/o Mercy Medical-NF, UTC bad addr

PROCEEDING: 08/13/2004 CALENDAR: 08/27/2004 10:00

All pending matters continued to August 27th, 2004 at 10:00 a.m. in Courtroom #2. Dr. William C. Wilkerson appointed to examine alleged and render a written report to the Court.

PROCEEDING: 08/25/2004 CALENDAR:

Report filed by Dr. William C. Wilkerson. [06]

PROCEEDING: 08/27/2004 CALENDAR: 09/27/2004 09:00

All pending matters continued to September 27th, 2004 at 9:00 a.m. in Courtroom #2.

PROCEEDING: 08/31/2004 CALENDAR:

Report filed by Dr. William C. Wilkerson. Dr. bill taxed against Inez Novak.

PROCEEDING: 09/22/2004 CALENDAR:

Motion to stay proceedings filed by Sharon Vest as Guardian and Conservator and set for September 27th, 2004.

PROCEEDING: 09/24/2004 CALENDAR:

GAL's reponse [sic] to Guardian's motion to stay all proceedings filed.

PROCEEDING: 09/27/2004 CALENDAR:

Motion to stay all proceedings is granted. [exhibit filed by respondent]